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**In the
Supreme Court of the United States**

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

VERSUS

FILIBERTO OJEDA RIOS, ET AL, RESPONDENTS

**On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit**

**BRIEF OF AMICUS CURIAE, NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENTS OJEDA RIOS, ET AL**

**ROBERT GLASS
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Tel.: 504/581-9065**

**For The National Associa-
tion of Criminal Defense
Lawyers**

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STATEMENT OF INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a national organization of criminal defense lawyers of approximately 6,000 members. Numbered among its members, and included on its board of directors, are federal public defenders and their deputies, and private lawyers who fill the Criminal Justice Act panels for appointment. All of the

defense lawyers in this case are appointed to represent respondents at government expense.

The NACDL, according to its by-laws, seeks among other things to foster, maintain and encourage the integrity of the criminal laws and their operation; to protect individual rights; to preserve and strengthen the adversary system of justice; and to ensure justice and due process for persons accused of crime. It is consistent with these goals that the executive arm of the federal government be held to the strictures of statutes enacted to protect defendants in criminal cases. The government's obligation to be bound by the rule of law is implicated in this case, thus making this case an appropriate one for amicus support of respondents' position by the NACDL.

SUMMARY OF ARGUMENT

Section 2518(8)(a) of Title 18, United States Code, creates a prophylactic rule to meet the danger that court authorized electronic surveillance tapes may be edited or altered. That prophylactic rule is the immediate sealing requirement. It prevents adulteration of the tapes in the most vulnerable period, after surveillance is completed, when the tapes can be reviewed for evidentiary gaps and like disappointments, and edited or altered to remove the gaps or strengthen the evidence. The tapes are protected from the point of sealing forward, and from the prophylactic perspective of the rule, the earlier the better.

As with all prophylactic rules, the application of the rule here may result in the exclusion of evidence that does not in fact suffer from the evil that the prophylactic rule was designed to prevent.

However, the very reason for a prophylactic rule is that the evil, when it in fact occurs, may be incapable of proof. The prophylactic rule shifts the focus of proof from the occurrence vel non of the evil to whether or not the rule was honored.

Obedience to the prophylactic rule of subsection (8)(a) is the evidentiary foundation for admissibility of testimony introducing the tapes. That is why Congress called the seal, or satisfactory proof of its delay or absence, "a prerequisite for the use or disclosure" of the tapes. As with any other evidentiary foundation, if the foundation of a seasonable sealing is not made out, the tape evidence is not admissible.

Because the essence of the prophylaxis is in the immediate sealing, a delayed sealing without justification is a violation of the prophylactic rule.

Because a prophylactic rule is useful and utilized only when the evil it is designed to prevent may be incapable of independent proof, the inability to prove the existence in fact of the evil in the particular case is not a satisfactory explanation for the absence of or delay in sealing. Because a prophylactic rule becomes useless if violated, and there will always be some explanation of why any rule is violated, the "satisfactory explanation" for delayed obedience to the statute must be something more than a mere chronicle of the events leading up to the violation; a satisfactory explanation is one that is affirmatively justified under the totality of the circumstances.

ARGUMENT

1. The surveillance and interception by electronic devices of private conversations between citizens, by the police force of our national government,

drastically alters the balance of privacy and power that had obtained between American citizens and their government during the first two centuries of the Republic. By 1968, if not before,¹ state of the art electronic technology enabled the ready and indiscriminate exercise of this surveillance power by the investigative agencies of the national government. On the one side there were legitimate and pressing law enforcement needs. On the other side there was the spectre of Big Brother and the distortions and manipulations to which the electronic surveillance power could lend itself. In 1968 it was time to regularize the procedures, to enable the process of legitimate law enforcement while limiting the powers of government for abuse.

¹See Lopez v. United States, 373 U.S. 427, 441 (concurrence of Chief Justice Warren), 446 (dissent of Justice Brennan).

Section 2518 of the 1968 law (18 U.S.C. §§2510-2520, as amended) creates procedures that both enable legitimate law enforcement and limit the potential for abuse by law enforcement of the electronic interception power. Subsection (8)(a) addresses one of the preeminent concerns for abuse, the fear and misgiving that sophisticated electronics applied to tape recordings could alter and edit the meaning and import of this powerful evidence. The government concedes as much. "The principal purpose of Section 2518(8)(a) is to ensure the integrity of evidence obtained through electronic surveillance." Brief for the United States, p. 21.

2. Tape recordings can be altered or edited as they are made. They can be altered or edited after they are made. The ability to protect against alteration and editing, as well as the intrusions

necessary for such protection, differ depending upon where one is in the process.

Congress began in subsection (8)(a) by entreating the intercepting agency during the first stage, the recording process, to "protect the recording from editing or other alterations." What more could Congress do during this stage of the process? Because of constraints deriving from the essential secrecy and technical execution of electronic surveillance, who safely could be called upon to monitor and watch the electronic spies at work without compromising the effectiveness of their work? A judge would be the only safe choice. But could a judge feasibly be transplanted from the courtroom to the electronic war room to assure the integrity of the recording operation? And even if he could, how would judicial expertise over sophisticated electronic

methodologies be assured? There simply was no feasible way for Congress to monitor the monitors at the recording stage.² Therefore, Congress was reduced to the use of precatory words:

The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations.

Once the recording process is complete, the tape recordings themselves have become evidentiary objects. They are items of evidence that have been created under judicial sanction. The objects themselves can now be moved, in fact removed, from those who might or have cause to edit or alter them. Moreover, it is with these evidentiary objects in hand at the end of the surveillance period that the greatest

²Compare the differing constraints, in secrecy and in expertise, that enable an attorney to be an effective monitor during a corporeal lineup. See, United States v. Wade, 388 U.S. 218 (1967).

danger of editing and alteration exists. Conversations, once recorded, can be played over and over again and compared for evidentiary gaps and like disappointments. With the leisure to deliberate and reflect, with the time to edit and alter, the possibility and feasibility of adulteration of the tapes increases.³

³Note that in reacting to the decision in Jencks v. United States, 353 U.S. 657 (1957), the Justice Department registered its grave concern that if prosecutors were required to produce and disclose prior statements of its witnesses to the defense well before trial, the defense would be enabled to fabricate evidence to counter the government's witnesses. A principal danger was perceived to be in the lead time the defense would have to reflect upon, evaluate and react to the statements. Thus the Department prevailed upon Congress to limit the forced disclosure of witness statements until after the witness had testified. 18 U.S.C. §3500. And see Rule 26.2, F.R.Cr.P.

Given its experience with the Jencks Act, Congress could well have entertained concerns about lead time for the adulteration of taped conversations, as it did for lead time with regard to prior statements of government witnesses in the Jencks situation. After all, the 1968 act began its legislative journey through

Adulteration that serves the adulterer's purposes, yet has the greatest chance for avoiding detection, takes time. Immediate transfer of the originals of the tapes to the custody of a judicial officer is thus an appealing and practical solution, because it minimizes the time available to a potential adulterer. Immediate sealing insures that the tapes will be preserved intact and safeguarded against editing and alterations from the point of sealing forward. Congress had available a feasible and practical method to guarantee the integrity of tapes at this stage in the process. Congress was not limited to precatory admonitions.

Congress not long after Justice Brennan, in dissent in Lopez v. United States, 373 U.S. 427, 468 (1963), warned that: "Far from providing unimpeachable evidence, the devices lend themselves to diabolical fakery." In n. 17, Justice Brennan described an experiment by Professor Dash in which a sound studio "edited a tape in such a way as to reverse its meaning," yet the tape could not satisfactorily be proven to have been adulterated.

Enforcible restraints were available to it.

3. By enacting the requirement of immediate sealing, Congress created a prophylactic rule. As with all prophylactic rules, the prophylactic rule Congress created in subsection (8)(a) might operate more broadly than a particular case might, after the fact, turn out to need, but who would doubt the authority of Congress to create such a preventive rule?

Consider prophylactic rules created by this Court. The rule of Miranda v. Arizona⁴ is designed to prevent coerced confessions, but it sometimes keeps fully voluntary confessions either from being made or, if made, from being introduced. What this prophylactic rule does most importantly for our system, however, is keep a percentage of truly involuntary

⁴384 U.S. 436 (1966).

confessions, confessions which in a courtroom could not adequately be proved involuntary, from infecting the process. The rule of United States v. Wade⁵ is designed to insure the fairness of corporeal lineups, but because it is a prophylactic rule, it will, if violated, keep some fully fair identifications from consideration by the jury. What this prophylactic rule does most importantly for our system, however, is help to keep the police straight, and prevent a percentage of truly suggestive lineups, lineups which in a courtroom could not adequately be proved to be suggestive, from infecting the process.⁶

⁵388 U.S. 218 (1967).

⁶Compare, Tanner v. United States, ___ U.S. ___, 107 S.Ct. 2739 (1987), in which prophylactic Rule 606(b), F.R.Ev., regarding juror impeachment of the verdict, was construed by the Court to bar truthful testimony to prove a shocking and rampant abuse of mind altering substances by members of a jury sitting to judge culpability in a difficult, complex and serious federal criminal trial. If ever

The controversy surrounding these court created prophylactic rules in large part centers not on their utility but on whether the Court, rather than Congress, should "legislate" prophylactic rules and make the policy choices embodied in them. There can be no question but that Congress has the authority to create prophylactic rules such as the rule here of immediate sealing. The policy choices embodied in a prophylactic rule legislated by Congress are not subject to second-guessing or mitigation by the courts.

one might expect consensus by the citizenry on the fairness of a criminal trial, this was the case. The idea that a pixillated jury could be approved as constitutional, and that a citizen could be barred from proving the travesty in the courtroom, would surely evoke universal dismay. Yet the Court, recognizing that "[t]here is little doubt that post-verdict investigation into juror misconduct would [and presumably, if allowed, should] in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," U.S. at , 107 S.Ct. at 2747, upheld the prophylactic rule, even though the truth thereby became impossible of proof.

The prophylactic rule of immediate sealing recognizes the technological difficulty and expense involved in proving that tapes have been edited or otherwise altered. The procedure recognizes that a battle of experts, costly enough when all parties are of equal resource and problematic at best when an imbalance between government and ordinary litigants is counted in, may not be able to resolve questions of subtle editing and alteration. The procedure recognizes that there will be a residuum of cases in which no expert examination after the fact will prove one way or the other whether tapes have been tampered with, and so seeks to guard in advance against the possibility of tampering.

The procedure removes the question from litigation by imposing the prophylactic prerequisite of immediate sealing, and it confines litigation to the presence of a

timely seal or satisfactory explanation for the absence of the timely seal. In other words, the procedure demanded by Congress obviates the need for a hearing at which, as a practical matter, it might be impossible to make the showing that convinces a judge that tape recordings, in fact altered or distorted, were compromised.

The seal proves the integrity of the tapes from the point of sealing forward. All delays in sealing undermine the prophylactic protection for the tapes, because delay creates the opportunity for adulteration. The "seal provided for by this subsection" is the immediate seal that guarantees without a hearing the integrity of the tapes from the point of sealing forward.

Subsection (8)(a) provides a safety valve for a too-rigid application of the rule of immediate sealing. "[A]

satisfactory explanation for the absence" of an immediate seal avoids mindless application of the rule to short delays compelled by unforeseen circumstances. Congress' intention was not, however, to create a hearing on the integrity of the tapes when the government seeks to justify a delayed sealing. Rather, the hearing is to be limited to the satisfactoriness of the government's explanation, a relatively limited and manageable hearing in contrast to the unwieldy investigation and hearing necessitated by questions of editing and tampering.

4. Although denominated by the various parties as an issue of suppression, the question before this Court properly is one of the foundation for admissibility of a certain class of sensitive evidence, to-wit, tapes of court authorized electronically intercepted communications. Congress is surely at liberty to devise

foundation requirements for a kind of evidence it considers to be highly vulnerable to manipulation and distortion and to demand that its evidentiary rules be honored. As with any other required evidentiary foundation, if the foundation is not there, the evidence upon which it rests is inadmissible.

The seal, or a satisfactory explanation for the absence of or the delay in sealing, is a foundation for the admissibility of the tapes in evidence. It is the sine qua non of admissibility. In the terminology of the statute, it is "a prerequisite for the use" of the tapes.

Section 2517 is the authorization section of the statute for disclosure and use of electronically intercepted communications. The statutory section at issue in this litigation, subsection (8)(a) of Section 2518, makes the sealing foundation "a prerequisite for the use or

disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517." Subsection (3) of Section 2517 declares the authority and competency "while giving testimony" of a person who has received information concerning electronically intercepted communications to disclose the contents of such communications. Thus, the sealing requirement is the foundation for testimony through which tapes are sought to be admitted, as it is the "prerequisite" for disclosure "while giving testimony." Other uses authorized by Section 2517 (such as the sharing of investigative leads with other investigators) are not governed by the sealing requirement; only the right to give testimony under oath in any proceeding held under the authority of the

United States is controlled by the presence or absence of a timely seal.

5. With this analysis the government's arguments are readily met and overcome. The government first argues that the statute does not require suppression of the tapes because of a delay in sealing; a seal any time before introduction of the tapes is all that is demanded. Because, however, immediate sealing is the essence of the prophylaxis deemed necessary by Congress, and because a seal placed on tapes long after the opportunity for adulteration has passed is no more effective than locking the barn door after the horse has escaped, the government's argument must fail. The "seal provided for by this subsection" is an "immediate" seal.

The government next argues that as the objective of Congress' prophylactic rule is integrity of the tapes, the tapes

should be admissible if the defendants cannot satisfy the court that the tapes have been compromised. However, an essential motivating force behind the prophylactic rule is that it may be impossible to prove that tapes, which are in fact compromised, have been edited or altered. The function of the prophylactic rule is to dispense with the task, perhaps impossible of accomplishment, of proving adulteration, by the act of sealing to prevent adulteration. When Congress unambiguously stated that seasonal sealing is the "prerequisite" for admissibility, it meant what this Court meant when it designed prophylactic rules in the confession and lineup situations, and when it enforced the prophylactic rule in the juror impeachment situation. The rule is violated even if the evil which the rule is designed to prevent is not provable in the particular case.

Finally the government argues that the "satisfactory explanation" required by subsection (8)(a) for the absence of the immediate seal is no more than a chronicle of the why's and wherefore's, rather than a justification that is to be supported by the persuasiveness of the reasons for the delay in sealing. It has been said with some justice that every crime can be explained. It has also been said that explanation is not justification. Amicus takes no position on the particular contours of the formulation of the test for finding when a satisfactory explanation exists, but sees no reason why the totality of the circumstances

formulation of the court of appeals, found by this Court to be appropriate in so many other applications in the criminal law, is not suited as well to the task at hand.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,



ROBERT GLASS
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Tel.: 504/581-9065

For The National Association
of Criminal Defense
Lawyers

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